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No. 08-552

In the Supreme Court of the United States

IBRAHIM A. ALI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether decisions of the Attorney General and the Board of Immigration Appeals classifying "crime[s] involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), warrant deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

2. Whether the agency may consider evidence beyond the record of conviction in determining whether an alien was convicted of a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 521 F.3d 737. The opinion of the Board of Immigration Appeals (Pet. App. 13-19) and the order of the immigration judge (Pet. App. 20-22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2008. A petition for rehearing was denied on May 28, 2008 (Pet. App. 23). On August 7, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 25, 2008, and the petition was filed on October 23, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. An alien may be eligible for adjustment of status if he "is admissible to the United States for permanent residence." 8 U.S.C. 1255(a)(2). An applicant for adjustment of status has the burden of proving that he is admissible. 8 U.S.C. 1229a(c)(2)(A). An alien is inadmissible if he has been convicted of a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).[1]

2. Petitioner is a native and citizen of Jordan who was admitted to the United States as a lawful permanent resident on December 26, 1977. Pet. App. 1; Administrative Record 775, 853 (A.R.). On December 19, 2000, petitioner was convicted in the United States District Court for the Northern District of Illinois of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. Pet. App. 1-2, 14; A.R. 759. Petitioner had conspired to sell firearms without a license in violation of 18 U.S.C. 922(a)(1)(A) and 18 U.S.C. 924(a)(1). Pet. App. 2.

3. On March 13, 2001, the former Immigration and Naturalization Service served petitioner with a Notice to Appear, which charged that petitioner is subject to removal pursuant to 8 U.S.C. 1227(a)(2)(C), as an alien who committed a firearms offense after being admitted. A.R. 853-854. Subsequently, petitioner was

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[1] An alien who is inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) may nevertheless adjust his status if he is granted a waiver of inadmissibility under 8 U.S.C. 1182(h). However, such a waiver is unavailable to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if * * * since the date of such admission the alien has been convicted of an aggravated felony." 8 U.S.C. 1182(h). Petitioner conceded that he had been convicted of an aggravated felony, see Pet. App. 2, so petitioner was not eligible for a waiver of inadmissibility.

also charged with removability pursuant to 8 U.S.C. 1227(a)(2)(A)(iii) and 8 U.S.C. 1101(a)(43)(C), as an alien who has been convicted of an aggravated felony involving firearms trafficking. A.R. 851-852. Petitioner conceded removability on both charges. A.R. 77, 94.

Petitioner then applied for relief from removal, including, as relevant here, adjustment of status under 8 U.S.C. 1255(a). A.R. 72. The immigration judge (IJ) ruled that petitioner's conviction qualified as a crime involving moral turpitude, such that petitioner was inadmissible and therefore ineligible for adjustment of status. A.R. 64-73. The IJ denied petitioner's application and ordered him removed to Jordan. A.R. 72-73.

4. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA or Board). Pet. App. 13-19. On April 3, 2007, the BIA dismissed petitioner's appeal. *Id.* at 19. The BIA found that there was "sufficient evidence to demonstrate that [petitioner's] conspiracy involved fraud" in violation of 18 U.S.C. 371. Pet. App. 18. The BIA noted the IJ's reliance on statements in petitioner's presentence report (PSR) that he "misrepresented, concealed and hid, and caused to be misrepresented, concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy." *Ibid.* Deeming that evidence from the PSR sufficient to demonstrate that petitioner's crime involved moral turpitude, the BIA upheld the IJ's determination that petitioner was inadmissible under 8 U.S.C. 1182(a)(2)(A). Pet. App. 19.

5. Petitioner filed a petition for review with the court of appeals. On April 4, 2008, the court of appeals denied the petition for review. Pet. App. 1-19.

The court first ruled that the BIA's classification of a crime as one involving moral turpitude is entitled

to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), which are applicable in the immigration context under *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999). Pet. App. 3. It reasoned that "'[c]rime involving moral turpitude' is an open-ended term; the Board and other immigration officials are both required and entitled to flesh out its meaning; and as the Board has done this through formal adjudication the agency is entitled to the respect afforded by the *Chevron* doctrine." *Ibid.*

The court of appeals then affirmed the BIA's holding that petitioner's crime involved moral turpitude. The court stated that the BIA had "good reason" to conclude that petitioner's conviction for violating 18 U.S.C. 371 "entailed fraud," and that petitioner did not dispute that fraud crimes necessarily involve moral turpitude. Pet. App. 6. The court observed that "[t]he judgment of conviction describes the crime as [c]onspiracy to defraud the United States." *Ibid.* (second pair of brackets in original); see A.R. 759 (describing the "Nature of Offense" as "Conspiracy to defraud the United States"). The court of appeals then noted that "the [PSR] adds: 'the defendants misrepresented, concealed and hid, and caused to be misrepresented[,] concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy.'" Pet. App. 6 (second pair of brackets in original). The court then observed that "[t]he [PSR] also stated that [petitioner] and his confederates sold the guns to someone who, they believed, would resell them

to known thugs (members of the Latin Kings street gang) in exchange for cocaine." *Ibid.*[2]

The court rejected petitioner's argument that the BIA improperly relied on petitioner's PSR because the PSR is evidence beyond the record of conviction. The court observed that for purposes of proving the *existence* of a criminal conviction, 8 U.S.C. 1229a(c)(3)(B) lists specific documents that may be used. Pet. App. 9-10. However, for purposes of characterizing an offense under the immigration laws, the court noted the BIA's recent decision in *In re Babaisakov*, 24 I. & N. Dec. 306 (2007), which held that an IJ is permitted to consider the PSR along with other evidence to determine whether an alien's commission of bank fraud caused the loss of more than $10,000, thus rendering the bank fraud an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i). The court concluded that *Babaisakov* stood for a more general proposition that the agency may examine evidence "beyond the record of conviction to characterize or classify an offense." Pet. App. 10. The court therefore deferred to the approach in *Babaisakov* under *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), despite the existence of conflicting Seventh Circuit precedent that predated *Babaisakov*. Pet. App. 11 (citing *Hashish* v. *Gonzales*, 442 F.3d 572, 575, cert. denied, 549 U.S. 995 (2006); *Padilla* v. *Gonzales*, 397 F.3d 1016, 1019 (2005)). Accordingly, the court stated:

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[2] The court did not rely on the BIA's alternative holding, that "unlicensed commercial trafficking in firearms is morally reprehensible" and therefore a crime involving moral turpitude, because it concluded that that ground was not supported by BIA precedent. Pet. App. 4.

> Given [8 U.S.C.] 1229a(c)(3)(B), which none of our prior opinions mentions, and *Babaisakov*, which is new, we now conclude that when deciding how to classify convictions under criteria that go beyond the criminal charge—such as the amount of the victim's loss, or whether the crime is one of "moral turpitude", the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction.

Pet. App. 11-12.[3]

Applying that analysis to petitioner's case, the court found that the judgment of conviction established that the crime of which petitioner was convicted was conspiracy to defraud the United States. The PSR was used, the court explained, "to ensure that the judgment was not a mistake (in other words, to ensure that there really *was* deceit * * *) and to make the moral-turpitude classification, a matter that stands apart from the elements of the offense." Pet. App. 12. The court of appeals therefore denied the petition for review. *Ibid.*

6. On November 7, 2008, two weeks after petitioner filed his petition for a writ of certiorari, the Attorney General decided *In re Silva-Trevino*, 24 I. & N. Dec. 687.[4] *Silva-Trevino* adopted a uniform standard for classifying crimes involving moral turpitude:

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[3] In light of the prior circuit precedent, the court of appeals pre-circulated its decision to all active circuit judges, pursuant to circuit rules allowing a panel to resolve an inconsistency in circuit law in that manner. Pet. App. 12.

[4] The Attorney General exercised his authority to review a BIA decision. See *Silva-Trevino*, 24 I. & N. Dec. at 687 (citing 8 C.F.R. 1003.1(h)(1)(I)).

> The Board of Immigration Appeals and the Federal courts have long struggled in administering and applying the Act's moral turpitude provisions, and there now exists a patchwork of different approaches across the nation. My review of this case presents an opportunity to establish a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied.

Id. at 688.

As part of this uniform framework, the Attorney General cited the court of appeals' decision in this case and ruled that "when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record." *Silva-Trevino*, 24 I. & N. Dec. at 699; see Pet. App. 8-11. *Silva-Trevino* therefore applied *Babaisakov*'s ruling—that evidence beyond the record of conviction may be considered in cases regarding the amount of loss that qualifies a crime as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i)—to cases classifying crimes involving moral turpitude, just as the court of appeals' decision had done in this case. See Pet. App. 10.[5]

ARGUMENT

Petitioner contends that the court of appeals' decision creates a conflict among the circuits over "how to apply deference owed to BIA decisions classifying crimes involving moral turpitude," Pet. 9, and whether evidence outside the record of conviction may be considered for that purpose, Pet. 11. Although there has been

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[5] Silva-Trevino has moved the Attorney General to reconsider his decision; that motion is pending.

some disagreement among the circuits on these issues, the court of appeals' decision does not warrant this Court's review for two reasons. First, no court of appeals has considered the impact of the Attorney General's decision in *Silva-Trevino*, which was issued less than two months ago and bears on both questions presented. Second, this case would not be a suitable vehicle for deciding those issues in any event, because the court of appeals' conclusion that a fraud offense constitutes a crime involving moral turpitude was both undisputed and compelled by this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), and because the record of conviction in this case establishes that petitioner was convicted of conspiracy to defraud the United States.

1. a. Petitioner correctly notes (Pet. 9-11) that before the Attorney General adopted a uniform framework for defining "crime involving moral turpitude" in *Silva-Trevino*, the circuits were in conflict over whether *Chevron* applied to the agency's decisions that classified a crime as one involving moral turpitude. The Seventh Circuit in this case joined the First, Third, Fourth, and Eighth Circuits, which have applied *Chevron* to such decisions. Pet. App. 3; accord *Cabral* v. *INS*, 15 F.3d 193, 195 (1st Cir. 1994); *Knapik* v. *Ashcroft*, 384 F.3d 84, 87-88 (3d Cir. 2004); *Yousefi* v. *INS*, 260 F.3d 318, 326 (4th Cir. 2001) (per curiam); *Franklin* v. *INS*, 72 F.3d 571, 572 (8th Cir. 1995), cert. denied, 519 U.S. 834 (1996). Similarly, the Second and Fifth Circuits have applied *Chevron* to the agency's determination that a certain crime is one involving moral turpitude, although they have "review[ed] *de novo* whether the elements of a state or federal crime fit the BIA's definition of a [crime involving moral turpitude]." *Smalley* v. *Ash-*

croft, 354 F.3d 332, 336 (5th Cir. 2003); accord *Wala* v. *Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007). Adopting a contrary approach, the Ninth Circuit has not applied *Chevron* at all to the agency's interpretation of "crime involving moral turpitude." *Plasencia-Ayala* v. *Mukasey*, 516 F.3d 738, 743-744 (2008). In addition to noting that the agency does not administer or have expertise in interpreting criminal statutes, the Ninth Circuit also based its approach on the notion that "the BIA has done nothing to particularize the meaning of [crime involving moral turpitude]." *Id.* at 744.

In *Silva-Trevino*, the Attorney General separated the definition of crime involving moral turpitude from the categorical approach's rigid focus on the charging elements of a criminal statute. See *In re Silva-Trevino*, 24 I. & N. Dec. 687, 699 (Att'y Gen. 2008). And Congress has expressly provided that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1). Under *Silva-Trevino*, while an IJ and the BIA will still initially use the categorical approach, they also may determine whether an offense constitutes a crime involving moral turpitude by reference to evidence that is not considered in the categorical approach: Instead of being limited to evidence in the record of conviction, cf. *Shepard* v. *United States*, 544 U.S. 13, 23, 26 (2005), the IJ and the BIA may consider any evidence "if doing so is necessary and appropriate," *Silva-Trevino*, 24 I. & N. Dec. at 699. It is therefore not necessary for the IJ or the BIA to conclude that the elements of a criminal offense categorically establish the crime as one involving moral turpitude in order to

find an alien inadmissible for committing a crime involving moral turpitude.[6]

Silva-Trevino thus undermines the basis for the Ninth Circuit's decision not to apply *Chevron* to agency classifications of crimes involving moral turpitude. That decision was based on the perception that the BIA, in classifying such crimes, had been confined to examining the elements of the offense under criminal statutes, see *Plasencia-Ayala*, 516 F.3d at 744, as the BIA had been applying the categorical approach adopted by the circuit where the case arose, see *Silva-Trevino*, 24 I. & N. Dec. at 693. As explained in *Silva-Trevino*, however, the BIA is not simply identifying the elements of a criminal offense, but is rather articulating and applying its own independent definition of "crime involving moral turpitude" that is not limited to an examination of the elements of a criminal offense.[7] The Ninth Circuit

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[6] *Silva-Trevino* establishes an approach under which the BIA will define "crime involving moral turpitude" through formal adjudication, and as part of that process will examine evidence beyond the record of conviction. *Silva-Trevino* therefore gives content to the term "crime involving moral turpitude" and the statutory and regulatory provisions through which the Attorney General conducts removal proceedings. It therefore warrants deference under *Chevron* and *Aguirre-Aguirre*. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001) ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking and formal adjudication.").

[7] Contrary to the Ninth Circuit's characterization, the BIA was never administering criminal statutes before *Silva-Trevino*. Rather, the agency was defining the term "crime involving moral turpitude" as a matter of federal law under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and under the categorical approach, that definition looked to various provisions of state and federal criminal laws. See *Cabral*, 15 F.3d at 196 n.5 ("Of course, the definition of a [crime involving moral turpitude] * * * is a matter of federal law. We look to state

therefore may very well change course and apply *Chevron* deference to the Attorney General's or the BIA's classifications of crimes involving moral turpitude.[8] In fact, an en banc panel of the Ninth Circuit recently granted the government leave to brief the question whether that court should reconsider its refusal to accord *Chevron* deference to the BIA's decision that a particular crime is one involving moral turpitude. *Marmolejo-Campos* v. *Mukasey*, No. 04-76644 (9th Cir. reargued en banc June 23, 2008). Until the issue is further developed in the lower courts, this Court's intervention would be premature.

b. In any event, the applicability of *Chevron* is irrelevant here, because all circuits agree with the court below that an element of fraud makes an offense inherently one involving moral turpitude. See, *e.g.*, *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063, 1074 (9th Cir. 2007) (en banc) (Reinhardt, J., writing for a majority of the court). Petitioner's judgment of conviction establishes that he was convicted of conspiracy to defraud the United States. Pet. App. 6, 12. The court of appeals

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law only to determine the elements of the offense of conviction.") (citations omitted).

[8] *Silva-Trevino* also undercuts the Ninth Circuit's concern that the agency had not done anything to particularize the definition of "crime involving moral turpitude." See *Plasencia-Ayala*, 516 F.3d at 744; *Silva-Trevino*, 24 I. & N. Dec. at 706 & n.5.

Moreover, some judges on the Ninth Circuit have advocated that the "en banc court" in an appropriate case address the "anomalies" presented by "importing *Taylor*'s criminal sentencing test" into immigration cases. *Kawashima* v. *Mukasey*, 530 F.3d 1111, 1124 (2008) (O'Scannlain, J., specially concurring, joined by Callahan, J.), petition for rehearing en banc pending, No. 04-74313 (filed Sept. 15, 2008); see *id.* at 1122-1123 (quoting the court of appeals' decision in this case); Pet. App. 7-11.

therefore properly concluded that the crime at issue in this case—a crime involving fraud or deceit—constitutes a crime involving moral turpitude. *Id.* at 5-6. That result was compelled by this Court's decision in *De George*. See 341 U.S. at 232. Indeed, petitioner has not disputed that a fraud offense qualifies as a crime involving moral turpitude. See Pet. App. 6. Issues of *Chevron* deference are therefore irrelevant to the question whether petitioner's crime involved moral turpitude and therefore rendered him ineligible for discretionary relief.

2. Petitioner also contends (Pet. 12-16) that the court of appeals erred in holding that the IJ and the BIA could consider evidence beyond the record of conviction in classifying crimes involving moral turpitude. See Pet. App. 10-12. Although other courts of appeals have previously reached the opposite conclusion, see generally *Hashish* v. *Gonzales*, 442 F.3d 572, 575-576 (7th Cir.), cert. denied, 549 U.S. 995 (2006), that issue likewise does not warrant review at the present time.[9]

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[9] Some courts of appeals have also held that an IJ may not consider evidence beyond the record of conviction in determining whether an alien's prior criminal conviction qualifies as an aggravated felony, for which the alien may be removed from the United States under 8 U.S.C. 1227(a)(2)(A)(iii). See, *e.g.*, *Gertsenshteyn* v. *United States Dep't of Justice*, 549 F.3d 137, 146 (2d Cir. 2008); *Kawashima*, 530 F.3d at 1118. But see, *e.g.*, *Nijhawan* v. *Attorney Gen. of the United States*, 523 F.3d 387, 392-399 (3d Cir. 2008), petition for cert. pending, No. 08-495 (filed Oct. 14, 2008). The Second Circuit has acknowledged that its approach in *Gertsenshteyn* "is arguably in tension with" the Seventh Circuit's decision in this case. *Gertsenshteyn*, 544 F.3d at 146 n.9. But as the court explained, there is no square conflict because the two cases involve differently worded statutory provisions. *Ibid.* (The classification of petitioner's offense as an aggravated felony was not at issue in this case, as petitioner conceded removability on that basis.) In any event, neither

a. Until recently, the BIA had been applying a categorical approach to classifying a crime as one involving moral turpitude, "in accordance with the law of the circuit in which an alien's case [arose]." *Silva-Trevino*, 24 I. & N. Dec. at 693. And before the court of appeals' decision here, each circuit to consider the issue had used the categorical approach adopted for criminal sentencing to determine whether a particular crime was one involving moral turpitude. See *Hashish*, 442 F.3d at 575-576. Under that categorical approach, courts generally could only consider evidence such as "the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the plea transcript." *Silva-Trevino*, 24 I. & N. Dec. at 699; see *Shepard*, 544 U.S. at 23, 26; *Taylor* v. *United States*, 495 U.S. 575, 600-602 (1990); see also *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 187 (2007) (explaining lower courts' use of the term "modified categorical approach"). But the Attorney General has since determined that the term "crime involving moral turpitude" can include crimes whose charging elements do not categorically involve moral turpitude, and that the IJ and the BIA therefore may consider evidence beyond the record of conviction. *Silva-Trevino*, 24 I. & N. Dec. at 699. When a court of appeals construes an ambiguous statutory phrase and the responsible agency subsequently interprets that phrase in a manner "otherwise entitled to *Chevron* deference," the agency's interpretation is entitled to such

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the Second Circuit nor the Ninth Circuit has yet had the opportunity to reconsider its approach in light of the BIA's decision in *Babaisakov*, which was later approved in the Attorney General's opinion in *Silva-Trevino*, and which made clear that an IJ in certain circumstances may look beyond the record of conviction to classify an alien's prior offense as an aggravated felony.

deference notwithstanding a prior court of appeals decision to the contrary. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) Because no court of appeals has yet considered the Attorney General's recent decision in *Silva-Trevino*, this Court's review is unwarranted on the question whether classification of a crime as one involving moral turpitude may be based on evidence that could not be considered under the categorical approach used for criminal sentencing.

b. Even if that issue otherwise warranted review, however, this case would not be an appropriate vehicle for considering it. The court of appeals' decision was correct even under the categorical approach, because it was unnecessary to refer to petitioner's PSR. As the court of appeals explained (Pet. App. 6, 12), the judgment of conviction described petitioner's crime as "[c]onspiracy to defraud the United States," see A.R. 759, and the PSR simply confirms what the judgment states. Because petitioner does not dispute that the judgment of conviction can furnish a proper foundation for determining whether a crime is one involving moral turpitude, there is no occasion here to decide whether such a determination can be based on evidence that cannot be considered under the categorical approach used for criminal sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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